

IN THE COURT OF CRIMINAL APPEALS OF TENNESSEE  
AT NASHVILLE

Assigned on Briefs October 25, 2005

**STATE OF TENNESSEE v. THOMAS DAVID ROSA**

**Appeal from the Circuit Court for Giles County**  
**No. 10482     Jim T. Hamilton, Judge**

---

**No. M2005-00148-CCA-R3-CD - Filed February 16, 2006**

---

The Appellant, Thomas David Rosa, appeals the revocation of his probation by the Giles County Circuit Court. On August 27, 2004, Rosa was granted probation and placed on supervision for the balance of an effective eight-year sentence for burglary and theft of property convictions. Prior to the commencement of the revocation hearing, Rosa was removed from the courtroom based upon the trial court's finding of "unruly behavior." The hearing then proceeded in Rosa's absence. Following the State's introduction of proof, the trial court found Rosa in violation of the conditions of his probation based upon his committing new offenses and failing to pay restitution. On appeal, Rosa argues: (1) that his removal from the courtroom violated his fundamental right of due process in that he was precluded from confronting witnesses, presenting proof in his own behalf, and assisting counsel in his defense; and (2) the evidence was insufficient to revoke his probation. Because we conclude that Rosa's due process rights were violated, we reverse the judgment of the trial court and remand for a new revocation hearing.

**Tenn. R. App. P. 3; Judgment of the Circuit Court Reversed and Remanded**

DAVID G. HAYES, J., delivered the opinion of the court, in which JOHN EVERETT WILLIAMS and NORMA MCGEE OGLE, JJ., joined.

Larry M. Roe, Jr., Columbia, Tennessee, for the Appellant, Thomas David Rosa.

Paul G. Summers, Attorney General and Reporter; Elizabeth B. Marney, Assistant Attorney General; Mike Bottoms, District Attorney General; and Patrick Butler, Assistant District Attorney General, for the Appellee, State of Tennessee.

**OPINION**

**Factual Background**

In January of 2003, a Giles County jury found the Appellant guilty of burglary, theft of property over \$1000, and theft of property under \$500, and, in February of 2003, he received an

effective eight-year sentence. On August 27, 2004, the Appellant's sentences were suspended, and he was placed on probation.<sup>1</sup> The trial court's order of probation provided that the Appellant was required to pay the victim \$7,270 in restitution beginning on October 15 2004, at a rate of \$200 per month. Although the Appellant's sentence was suspended on August 27, 2004, he was not released from confinement until September 29, 2004.

On October 29, 2004, a revocation warrant was issued against the Appellant alleging that he had violated the terms of his probation for failure to (1) "obey the laws," (2) "report all arrests," (3) "report as instructed," and (4) "observe any special conditions." The violation warrant also contained the notation that "Thomas Rosa was arrested and charged with Felony Evading Arrest, Driving on a Suspended License and Reckless Endangerment by the Pulaski Police Department." No factual basis was given for failure to "observe any special conditions." A probation revocation hearing was held on December 20, 2004. Prior to the introduction of any proof, an exchange occurred between the trial court and the Appellant regarding the nature of the proceeding and the Appellant's request for different counsel. Following an "outburst" from the Appellant, the Appellant was removed from the courtroom, and the hearing continued in his absence.

At the hearing, Officer Joey Turner, a patrol officer with the Pulaski Police Department, testified that on October 11, 2004, twelve days after the Appellant's release from confinement, he attempted to stop a vehicle driven by the Appellant, resulting in a high speed pursuit through the streets of Pulaski. Turner testified that the chase reached speeds of ninety miles per hour before the police broke off the encounter. Based upon this conduct, the Appellant was charged with felony evading arrest, driving on a suspended license, and reckless endangerment. A supervisor with the Board of Probation and Parole testified that the violation warrant was, in effect, based on the Appellant's new criminal charges. The probation supervisor admitted that he did not "state in the violation report or the warrant that failure to pay restitution was the basis of the warrant." At the conclusion of the State's proof, the trial court revoked the Appellant's probation, finding the Appellant had failed to obey the law and had failed to make restitution as ordered.

### **Analysis**

Relying upon *State v. Wade*, 863 S.W.2d 406, 408 (Tenn. 1993), as authority, the Appellant argues that he was denied due process when the trial court removed him from the courtroom. He asserts that his absence during the entire hearing impeded his efforts to defend against the charges. Specifically, he alleges that he did not have the opportunity to testify, present witnesses, introduce documentary evidence, confront and cross-examine witnesses, or assist his attorney. The State responds that the Appellant waived his right to be present at the proceeding, as authorized by Rule 43 of the Tennessee Rules of Criminal Procedure, due to his disruptive conduct. In pertinent part, Rule 43(b) provides that:

---

<sup>1</sup>The conditions of probation, which typically require both the acknowledgment and signature of the probationer, were neither introduced at the hearing or included in the record.

the defendant shall be considered to have waived the right to be present whenever a defendant, initially present: . . . (2) [a]fter being warned by the court that disruptive conduct will cause the defendant to be removed from the courtroom, persists in conduct which is such as to justify exclusion from the courtroom. . . . [A]fter the defendant's removal from the courtroom, he or she must be represented in court by competent counsel; and, if the defendant has been removed from the courtroom, he or she shall be given a reasonable opportunity to communicate with counsel during the trial. If a trial is proceeding with the defendant excluded from the courtroom because of disruptive conduct, the court shall periodically determine at reasonable intervals whether the defendant will then signify willingness to avoid creating a disturbance if allowed to return to the courtroom and shall permit such return when the defendant so signifies and the court reasonably believes the defendant.

First, we would observe that Rule 43 addresses itself to the trial process, not a revocation proceeding. Nonetheless, the language of Rule 43(a), which requires that a defendant "shall be present . . . at every stage of the trial[.]" is virtually identical with that of Tennessee Code Annotated section 40-35-311(2003), which requires that "the defendant must be present" at the revocation hearing. Moreover, with regard to due process, "a probationer . . . is entitled to . . . an opportunity to appear and to present evidence in his own behalf [and] a conditional right to confront adverse witnesses. . . ." *Wade*, 863 S.W.2d at 408 (quoting *Gagnon v. Scarpelli*, 411 U.S. 778, 786, 93 S. Ct. 1756, 1761 (1973)). For these reasons, we conclude that the trial provisions of Rule 43 are equally applicable to revocation proceedings.

Prior to the start of the revocation hearing, the record notes that an "off the record bench conference was held" with those present being the prosecutor, defense counsel, and the trial judge. After the conference concluded, the trial judge announced, "Well, we're going to go on with it today, since we have these officers up here. We are going to put all this on the record. Just bring him around. Have a seat, Mr. Rosa."

The transcript of the hearing then reflects the following colloquy between the trial judge and the Appellant, following which the bailiff ordered the Appellant from the courtroom:

[Appellant]: Your Honor, I was informed that this was going to be a bond hearing; not a preliminary hearing.

[The Court]: Well, it's not; sit down.

[Appellant]: Your Honor, I don't want this counsel.

[The Court]: Beg your pardon?

[Appellant]: I don't want this counsel, Your honor.

[The Court]: Well, have a seat, you've got him as counsel.

[Appellant's counsel]: Your Honor, for the record, I don't have an objection if he wants to remove ...<sup>2</sup>

[The Court]: Alright, have a seat Mr. Rosa.

[The Appellant]: Your Honor, I was not prepared for this; I do not have my witnesses here. I was informed of today's. . .

[The Court]: Have a seat, or I'll have you taken out of here and we'll have it in your absence.

[The Appellant]: I ain't got no problem with that, Your Honor.

[The Court]: Okay, call your first witness.

(Another outburst from defendant)

[The Bailiff]: Take Mr. Rosa back to jail.

(Whereupon, defendant was removed from courtroom)

As observed by a reading of Rule 43(b)(2), to justify the removal of a defendant from the courtroom based upon disruptive conduct, certain findings and procedural requirements must be met. The following reflect non-compliance with the rule in this case:

1. The conduct must be "such as to justify exclusion from the courtroom." Here, the record fails to establish the nature of the "unruly behavior" other than "another outburst."
2. After removal from the courtroom, "[the defendant] shall be given reasonable opportunity to communicate with counsel during the [hearing]." The record does not reflect that this occurred.
3. "[T]he court shall periodically determine at reasonable intervals whether the defendant will then signify willingness to avoid creating a disturbance if allowed to return to the courtroom and shall permit such return when the defendant so signifies and the court reasonably believes the defendant." Our review of the record does not reveal that such action was taken.

The obligation of compliance with the provisions of Rule 43(b)(2), as provided by the rule, is upon the trial court; thus, we conclude that the State's argument of waiver due to trial counsel's failure to object is without merit.

Because we conclude that the Appellant's removal from the courtroom violated both his statutory right and due process right to be present at his revocation hearing, we reverse the order of revocation and remand for a new hearing. *See State v. Ballard*, 21 S.W.3d 258, 262 (Tenn. Crim. App. 2000). The issue of sufficiency of the evidence is pretermitted in view of our holding that the Appellant's removal denied him his right to be present, which included his right to testify and present proof in his own behalf.

---

<sup>2</sup>At the conclusion of the hearing, trial counsel moved to withdraw as counsel for the Appellant, which was granted by the trial court.

## **CONCLUSION**

In conclusion, we hold that the trial court violated the Appellant's right to be present at his revocation of probation hearing. This error requires reversal. Accordingly, the judgment of the trial court is reversed, and this matter is remanded for a new hearing.

---

DAVID G. HAYES, JUDGE